JD–125-03
Buffalo, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DECK BROS., INC. AND ITS ALTER EGO,
KELLNER BROS. INC.

And CASE 3-CA-23914

UNITED STEEL WORKERS OF AMERICA,
AFL-CIO

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For the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge: This case was tried in Buffalo, New York on June 9 and 10, 2003. The original charge was filed by United Steelworkers of America, AFL-CIO (hereafter Union) on November 6, 2002. The first amended charge was filed by the Union on December 16, 2002 and the second amended charge was filed January 31, 2003. Complaint issued on January 31, 2003. [1]The Complaint alleges that Deck Bros., Inc. (hereafter Deck Bros. or Respondent) and its alter ego, Kellner Bros. Inc. (hereafter Kellner Bros. or Respondent) have engaged in conduct in violation of Section 8(a)(1) and (5) of the Act. Respondent filed timely answer wherein, inter alia, it admits the jurisdictional allegations of the Complaint and the supervisory and agency status of Karl and Ronald Kellner.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I make the following

Findings of Fact

[1] All dates are in 2002 unless otherwise indicated.

I. Jurisdiction

The Respondent, a corporation, manufactures machine parts at its facility at 222 Chicago Street in Buffalo, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background and the Complaint Allegations

The Complaint alleges that Deck Bros. and Kellner Bros. are affiliated business enterprises with common ownership, management and supervision; have formulated and administered a common labor policy; have shared common equipment, premises and facilities; have shared employees and customers; and have held themselves out to the public as single-integrated business enterprises. As a result the Complaint alleges that Deck Bros. and Kellner Bros. have been, at all material times, alter egos and a single employer within the meaning of the Act.

At all material times, the Union has been recognized by Deck Bros. as the exclusive collective-bargaining representative of its employees in the following described Unit:

> All production and maintenance employees, full and part-time, exclusive of executives, supervisors employees not paid by the hour and office employees.

Deck Bros. and the Union have been signatories to successive collective-bargaining agreements, the most recent of which was effective by its terms from May 1, 2000 to April 30, 2003. The Complaint alleges that Respondent has violated the Act by repudiating and failing to adhere to all the terms and conditions of the collective-bargaining agreement by refusing to comply with the provisions pertaining to holiday pay and dues check off. The Complaint alleges that the following persons hold the positions named for Respondent and are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Ronald Kellner Bros., President; Karl Kellner Bros., Vice-President; and Hazel Weaver, Controller. The supervisory status of both Kellner brothers was admitted and the supervisory status of Weaver was denied.

It was stipulated that Respondent Kellner Bros.' employees had all been former employees of Deck Bros. and that the jobs, work production processes, and methods of production are the same for Kellner Bros. and Deck Bros.

B. Facts Related to the Creation and Operation of Kellner Bros.

Deck Bros. is a corporation which was, until September 3, 2002, engaged in business as a manufacturer of machine parts. Deck Bros. has been owned by Ronald and Karl Kellner since the early 1950s. Kellner Bros. was incorporated in August 2000 for the purpose of holding title to real property, including the Deck Bros. Plant and property at 222 Chicago Street, Buffalo, New York. Deck Bros. has had a collective bargaining relationship with the Union for at least 30 years. In the most recent collective-bargaining agreement, Article III is a dues check-off provision and Article X sets forth provisions concerning holiday pay.

The involved collective-bargaining agreement has provisions for wage reopeners. On a quarterly basis in the third year of the contract, management and Union representatives met to discuss increasing wages. One such reopener meeting took place in July 2002. At this meeting the employees were informed by Karl Kellner that Deck Bros. had no money to increase wages and that Karl Kellner and his brother had taken out home equity loans to keep the company going.[2] He also announced he was going to transfer assets and lease employees to Kellner Bros. because of a pending lawsuit against Deck Bros.

As of the date of hearing there were twelve employees in the bargaining unit. Machinist David Smith testified that the employees under Deck Bros. were classified as machinists AA, A, B, shippers and receivers, general laborers and machine maintenance. He also testified that Kellner Bros. has the same employee classifications and that Kellner Bros. employees perform the same tasks as they did for Deck Bros.[3] There was a layoff at Deck Bros. in January 2002 and some employees were laid off out of seniority. The Union grieved this layoff and won an arbitration award dated August 8, 2002, calling for two laid off employees to be recalled and made whole. The amount of money owing was estimated to be about $14,000. To date of hearing, the Respondent had not complied the arbitration award.

At the end of August 2002, the employees of Deck Bros. filled out forms making them employees of Kellner Bros. Deck Bros.' payroll/office manager Hazel Weaver handed the forms to employees while they were working at their machines. She told employees they were changing payroll service over to Kellner Bros., that the paperwork was simply for a name change and that they needed the forms filled out for the payroll service.

Smith testified that during the summer of 2002,shipments from the shop were going out to customers with paper work for Deck Bros. in some cases and Kellner Bros. in others. Work at the shop did not stop as it changed from Deck Bros. to Kellner Bros. The employees left work for the Labor Day weekend as Deck Bros. employees and returned the following Tuesday as Kellner Bros. employees. The sign on the Respondents' plant identified the business as Deck Bros. until April 2003.

In September 2002, Smith spoke to Karl Kellner about the arbitration award. Smith gave Kellner Bros. a proposed settlement for the award and Kellner said he was planning to appeal the award, but would send the settlement proposal to his lawyer.

About the end of September 2002, Smith learned that Kellner Bros. was not deducting Union dues. This was the first payroll period under Kellner Bros. At Ronald Kellner's instruction, Smith spoke with Weaver who said she would look into the matter and get back to him. She never provided any information about the matter to Smith thereafter.

Smith participated in a wage reopener meeting on October 10, 2002. The Union asked for a contract extension and Karl Kellner responded that the Company wanted a new contract and did not believe the old Deck Bros. contract still existed though Deck Bros. still existed as a corporation. Kellner said that operations had shifted to Kellner Bros. because of pending lawsuits, including the arbitration award discussed above. Kellner stated that Union dues would

[2] Karl Kellner indicated that he and his brother had borrowed about $350,000 for this purpose.

[3] It is Kellner Bros.' position that it did away with classifications when it took over Deck Bros. However, no question had arisen about classifications to date of hearing and Smith had not been told there had been changes in the classifications.

not be deducted until a new contract was reached. He also said the old contract would not be honored. Kellner also said he wanted to negotiate a new contract in November.

On October 16, 2002, Kellner and the Union entered into a written agreement to "continue with the same wages as per the current contract until early November when we will meet with the committee to discuss the wages again at that time. A date of November 15th has been agreed upon for final settlement."

The parties next met on November 5, 2002. Smith's notes indicate that one purpose of the meeting was to negotiate a new contract. Kellner Bros.' representative indicated that the old contract no longer existed and Kellner Bros. wanted to negotiate a new contract. The Union asked that Kellner Bros. sign an agreement accepting all the terms and conditions of the expired contract until April 30, 2003. Kellner Bros. declined. The Union's representative responded that the Union believed the old contract was still in effect, but that the Union would listen to what Kellner Bros. proposed. Kellner Bros. proposed doing away with job classifications and changing some of the wording in the procedures for layoff and recall. Kellner Bros. also wanted to reduce the Company's contribution for health insurance and drop the dental plan. It also proposed to cease providing work shoes for unit employees. It also wanted a one year contract so wages could be set annually. Just before the meeting ended the Union brought up the matter of the arbitration award. The Union was told there would be no appeal of the award, but that it was not going to act on it. Karl Kellner testified that the Union's consistent position has been that Kellner Bros. should honor Deck Bros.' expired collective bargaining agreement. The meeting ended with the parties agreeing to meet on November 19, 2002.

This meeting did not take place as the Union chose to file the charges with the Board. Since Thanksgiving 2002, no holiday pay has been paid to unit employees and since September 2002, no Union dues have been deducted from unit employees wages, though both are called for in the collective-bargaining agreement.

Kellner Bros. continued to offer Deck Bros.' 401 (k) plan and still uses forms with Deck Bros.' name on them in conjunction with the 401 (k) plan. Kellner Bros. uses the same administrator, Guardian, for the plan as did Deck Bros.. Kellner Bros. continued to provide the same health insurance as did Deck Bros. and forms used by Kellner Bros. in this regard still have Deck Bros.' name on them.

Through Smith, General Counsel introduced the minutes of a February 25, 2003 meeting of the New York Power Authority. Inter alia, the minutes list businesses in New York receiving grants of power at discounted rates and gives a capsule description of the current business status. It listed Deck Bros. and noted that it has lost a part of its business as its customer had shipped this work overseas. Deck Bros. continued to accept cheaper power under this grant without changing the name on the grant. Karl Kellner testified that the grant would be lost if the Power Authority learned of the change from Deck Bros. to Kellner Bros. Smith also found a listing of Deck Bros. in the Federal Register of January 17, 2003. These two items were found on the Internet by searching for listings for Deck Bros. A similar search for Kellner Bros. turned up nothing.

Smith testified that with the exception of the Deck Bros. sign that was taken down in April 2003, nothing has changed at the Kellner Bros.' facility from the way it was at Deck Bros. The same employees and management do the same type work, using the same machines and other equipment. Important Deck Bros.' customers were General Electric, a company called Cousins, Keller Technologies, Five Star, Moog, Linde, ITT Standard, Zeyon. These companies remain Kellner Bros.' customers. Smith testified from personal experience that Kellner Bros.

performs the same work for these customers as did Deck Bros. Kellner Bros. has the same suppliers as did Deck Bros. Employee Eric Dobrek testified on this subject in a manner similar to Smith. He added one customer, Eastman, Machine, that Smith was not personally familiar with. Dobrick testified that the same type work for this customer continued under Kellner Bros.

With the exception of dues check-off and holiday pay, Kellner Bros. operates the same as did Deck Bros. in virtually every way. Kellner Bros. has continued following the expired contract, though it contends that it does not exist. The employees still wear uniforms with Deck Bros. insignia though working for Kellner Bros. No new uniforms were issued when Kellner Bros. took over Deck Bros.' operation.

Shortly after Kellner Bros. took over the Deck Bros. operation, Kellner Bros. was able to secure some money from a new investor, who was issued shares in Kellner Bros. in 2003.

C. Discussion and Resolution of the Issued in this Proceeding.

As set forth below, the record establishes that Kellner Bros. is the alter ego of Deck Bros. The two companies are so interrelated that they are identical. As such, Kellner Bros. is bound to the collective bargaining agreement between Deck Bros. and the Union, and was not privileged to tell employees it would not honor the contract, and refuse to abide by dues check off and holiday pay provisions of the contract. Joe Costa Trucking, 238 NLRB 1516, 1522 (1979); Blazer Corp., *236 NLRB 103, 109 (1978);* M.B. Sturgis, Inc., 331 NLRB 1298 (2000); Crawford Door Sales Company, 226 NLRB 1144 (1976); Martin Bush Iron & Metal, 329 NLRB No. 15 (1999). Karl Kellner admitted that Respondents have failed to honor the dues check-off and holiday pay provisions of the contract. Absent the Union's agreement to new terms, not present here, Kellner Bros. was bound by the contract and violated Section 8(a)(1) and (5) of the Act by repudiating and failing to abide by the contract. Haley & Haley, Inc., 289 NLRB 649 (1988).

1. The Evidence Establishes That Deck Bros. and Kellner Bros. Are Alter Egos.

There are several objective factors relied upon in making an alter ego determination: (a) common ownership or control of the old and new entities; (b) substantially identical management, business purpose, operation, equipment, customers and supervision; and (c) the existence of an unlawful motive to avoid labor law obligations of one of the entities involved. See generally, Mining Specialist, Inc., 314 NLRB 268, 271 (1994); NLRB v. Omnitest Inspection Services, Inc., 937 F.2d 112, 118 (3d Cir 1991); Image Convention Services, Inc., 288 NLRB 1036, 1039 (1988); Advance Electric, 268 NLRB 1001; Crawford Door Sales Company, supra.

Although it is not necessary that each objective factor be present to conclude that an entity is an alter ego, each and every factor is present here and the evidence is unrebutted. Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1420 (D.C. Cir. 1984). The record reflects that Kellner Bros. continued using the same employees, who performed the same work for the same customers as they had at Deck Bros., using identical work methods and equipment. As in AAA Fire Sprinkler, Inc., 322 NLRB 69 (1996), the transition "was virtually seamless" and the interrelatedness of the operations establishes the alter ego finding.

a. Common Ownership or Control

The main focus in determining whether a disguised continuance or alter ego exists is common ownership or control over the two entities. International Harvester Co. & Muller International Trucks, Inc., 247 F.2d 791, 797-98 (1980). In this case, the officers and owners of

both companies are identical. Ronald Kellner is President of Deck Bros.[4]and President of Kellner Bros. He is also 50% owner of both companies. Karl Kellner is Vice-President of Deck Bros. and Vice-President of Kellner Bros. He is also 50% owner of both companies. Any contention Respondents may make about bringing in a new partner at a later time, after Kellner Bros. took over, is irrelevant. Redway Carriers, 301 NLRB 1113, 1115 (1999)("alter ego" status is to be determined based on the developments which took place at the time the alter ego was formed, not on what may have happened at a later date.

b. Identical Management and Supervision, Business Purpose, Operation, Equipment and Customers

1. Management and Supervision

Both management and supervision have remained identical under Kellner Bros. Randy Sanders was the direct, day to day supervisor for Deck Bros. unit employees and is the same for Kellner Bros.' employees, who are also the same. Ronald Kellner also performs certain supervisory functions for Kellner Bros. as he did for Deck Bros. The Vice President for Sales for Kellner Bros. is Doug DeChamps and he held the same position with Deck Bros. Hazel Weaver is referred to by management and employees as the office manager and controller of Kellner. She distributes paychecks, resolves pay roll, and other work hour disputes, handles unemployment problems and posts policies. Ronald Kellner sent employees to Weaver to inquired about union dues problems and pay check discrepancies. She performed the same functions for Deck Bros. as she does for Kellner Bros.

2. Business Purpose and Operations

Kellner Bros. is engaged in the exact same business as was Deck Bros, operating a general machine shop. Respondents stipulated at the hearing that the jobs of both companies were the same, the work is the same, and that the production processes and methods are the same. David Smith testified that he a general machinist at Kellner Bros., as he was at Deck Bros. He also testified that there was no difference in the work performed at Deck Bros. before the labor day weekend of 2002 and that performed at Kellner Bros. the Tuesday after the holiday weekend. Eric Dobrick also testified that his duties and position are the same with Kellner Bros. as they were with Deck Bros.

3. Equipment

The same employees performed their work at Deck Bros. and Kellner Bros. using exactly the same equipment, which was neither moved from or even repositioned at the facility. Employee witnesses testified that the equipment they used –C&C's, milling centers, milling machines, lathes, grinders and drill presses- all remained the same when Kellner Bros. took over. Karl Kellner admitted using the same equipment on the production floor. Kellner Bros. is

[4] Deck Bros. changed its name to R&K Custom Machinery on or about November 2002, because, according to Karl Kellner, "we just didn't need to use the name Deck Bros. anymore." The name change, which occurred after the alter ego Kellner Bros. was utilized, is not relevant to this case. Employees were not notified, and no action was taken with the New York State Division of Corporations to dissolve Deck Bros. which continues to exist. Tax returns show that Kellner Bros., Deck Bros., and R&K Custom Machinery are all related corporations. Ronald Kellner and Karl Kellner are also President and Vice-President, respectively, of R&K Custom Machinery.

also using the same office equipment, including the furniture, desk, and computers used by Deck Bros. Nothing was moved out.

There were some lease agreements between the two companies. Kellner Bros. assumed some of the Deck Bros. equipment leases and took over the lease payments on the equipment when Deck Bros. could not make payments.

Deck Bros. used two vehicles, a van and a stake truck. The same vehicles are used by Kellner. Until recently, both vehicles were registered in Deck Bros. name. Shortly before this hearing, the truck was registered under Kellner Bros. name. Under Kellner Bros. the same employees drive the vehicles just as they did with Deck Bros. Kellner Bros. paid nothing for the van.

4. Customers

Both the customers of Deck Bros., and the type of work performed for those customers remained the same when Kellner Bros took over. The unrebutted testimony established that Kellner Bros. employees perform the same work for the same customers, using the same equipment as they did at Deck Bros. Employee witnesses were able to identify the customers they performed work for by looking at the blueprints and on other forms given them by their supervisor. They specifically identified the major customers of Deck Bros., all of whom are customers of Kellner Bros. General Electric was named as providing about 65% of Decks Bros. work and GE continues to provide the same type and amount of work fot Kellner Bros.

The production time tickets show that employees finished work they started for Deck Bros. after the company became Kellner Bros. Karl Kellner admitted that Kellner Bros.' employees finished Deck Bros. orders in progress and sent it out to customers when it was completed. Deck Bros. received payment for work which had been completed and shipped before September 3, 2002, and used the money to pay bills payable to Kellner Bros. vendors. The Board in Gilroy Sheet Metal, 280 NLRB 1075 (1986), noted that whether the alleged alter ego took over any unfinished work started by the other company is an additional important factor in addressing alter ego questions. As was its practice as Deck Bros., Kellner Bros. continues to use sales representatives and has found a couple of new representatives who are talking to new customers. However, Karl Kellner's testimony that Kellner Bros. has both new customers and the old customers of Deck Bros. was conclusory and he did not give one example of new customers. Employee David Smith testified that he knew of only one new customer, which was recent, involving the machining of decorator bricks.

Finally, although both Deck Bros. and Kellner Bros. are "job shops," performing work for customers as it comes in the door, the main customers of Deck Bros. are the main customers of Kellner Bros. Employees testified that the work that comes in the door for Kellner Bros. is the same as that work performed for Deck Bros.

5. Operations

There was no evidence offered by Respondents at the hearing establishing that the two companies operated independently. There have been no changes, just a seamless transition from Deck Bros. to Kellner Bros. As in Advance Electric, supra, there was no hiatus in the change from Deck Bros. to Kellner Bros. Deck Bros. and Kellner Bros. have the same address and occupy the same building at 222 Chicago Street, Buffalo, NY, using the same phone number.

The same bargaining unit employees who worked at Deck Bros. work at Kellner Bros, as well as the same administrative and office staff employees, all with the same job duties. Twelve unit employees worked at Deck Bros; and the same twelve employees work at Kellner Bros. The employees work in the same positions and perform the same duties as they did for Deck Bros. Employees daily work procedures remain the same, including punching the same time clock, using production time cards, parking in the same parking lot, at the same time of day, working the same hours, with the same lunch time and break times. Employees report to their same supervisor for the same type of work assignments for the same customers. Supervisor Sanders handles grievances at Kellner Bros. as he did for Deck Bros. In addition, Karl Kellner testified that the labor relations policy was similar, offering no testimony as to how Kellner Bros. labor policy differed from the policy of Deck Bros. As with Deck Bros, Sanders distributes overtime, approves vacation time and employees' leave times for Kellner Bros. Floating holiday procedures are the same and are administered by Sanders as before. The sign on the building identified the facility as Deck Bros. for eight months after the company became Kellner Bros. Eric Dobrick has a key to the facility and opens it upon his arrival at work. He testified that he uses the same key he used for Deck Bros. to open up for Kellner Bros. Employees continue to wear Deck Bros. uniforms. Kellner Bros. uses the same suppliers as Deck Bros. The service and maintenance of equipment is carried out by the same, individuals and companies as used by Deck Bros. Shipping and delivery procedures are the same. Packing slips are the same and during the summer of 2002, packing slips were designated with both the Deck Bros. and Kellner Bros. name.

Employees are covered by the same life insurance carrier. Deck Bros. and Kellner Bros. use the same accountant. Both before and after the company became Kellner Bros., employees have had the same health insurance carrier with insurance documents identifying the group insured as Deck Bros. Employees have the same 401 (k) plan administrator, Guardian, and the contract both before and after the company became Kellner Bros. is still designated as "Deck Bros., Inc. 401 (k) Retirement plan. After Deck Bros. became Kellner Bros., Karl Kellner continued to sign documents on Deck Bros, letterhead.

Karl Kellner's testimony that Kellner Bros. never held itself out to the public as Deck Bros. is belied by the facts. After Deck Bros. became Kellner Bros., it held itself out to the public as Deck Bros. in order to wrongly derive an economic benefit from its name. For example, Deck Bros. obtained energy from the Power Authority of the State of New York at rates about 25% lower than from private power sources based on its employment projections. Karl Kellner admitted that even after Deck Bros. became Kellner Bros., it continued to accept the inexpensive power without notifying the State of New York of the change in name. He admitted that Kellner Bros. continues to pay electric bills coming in to Deck Bros. because, "if we alert the Power Authority that it's a different corporation we would lose that allotment. . . and the cost of power would go up." In the public site on the Internet for the Department of Commerce, the company is still known as Deck Bros. Employee David Smith, received a check drawn on a Deck Bros. bank check after it became Kellner Bros. This check was reimbursement for work clothing.

The record establishes under each and every factor considered by the Board, that Kellner Bros. is the alter ego of Deck Bros. As such, Kellner Bros. is bound by the terms of the collective-bargaining agreement between Deck Bros. and the Union. Karl Kellner admitted that no Union dues have been deducted from employees' checks and submitted to the Union, as required by Article II of the contract, since Kellner Bros. was formed, and also that all the holiday pay under Article X of the contract has not been paid. Thus Respondents have repudiated the contract in violation of Section 8(a)(1) of the Act. Holt Plastering, 317 NLRB 451 (1995); Mastronardi Mason Materials Co., 336 NLRB No. 136 (2001)(as alter ego was not privileged to

repudiate its obligations under the collective bargaining agreement); Haley & Haley, supra at 655. It is a violation of Section 8(a)(1) and (5) of the Act for an employer to fail to abide by the provisions of the collective-bargaining agreement, including provisions calling for it to deduct union dues from its employees' paychecks and remit the same to the Union. See, e.g., International Distribution Centers, 281 NLRB 742, 743 (1986). A violation is established where, as here, the collective-bargaining agreement contains a dues deduction clause which the employer failed to honor. Ogle Protection Service, 183 NLRB 682 (1970); Holt Plastering, supra; Mastronardi Mason Materials Co., supra.

2. The Existence of an Unlawful Motive is Established by Karl Kellner's Statements

It is not required that the General Counsel prove that Respondents harbored an unlawful motive in establishing the alter ego company. Market King, Inc., 282 NLRB 876, 877 fn. 3 (1987), superceded on other grounds by Image Systems, 285 NLRB 370 (1987)(evidence of unlawful antiunion motive in the creation of a corporation is relevant, but not essential, to a finding of alter ego status.

However, here, Deck Bros.' intent to evade the labor obligations to the Union could not be more clear. In 2002, Deck Bros. was experiencing severe financial problems and that Ronald and Karl Kellner took steps to evade their obligations with Deck Bros., including the collective-bargaining agreement. The record establishes that the Kellners began using the Kellner Bros. corporation for the expressed goal of escaping the arbitration award and evading their responsibilities under the collective-bargaining agreement. As soon as Kellner Bros. was utilized for payroll purposes in September 2002, Karl Kellner used the mere change in name to tell the Union that the old contract was not in effect anymore, he would not honor it, and that he wanted a new contract with substantial concessions. See, Haley & Haley, 289 NLRB 649 (1988)(respondent activated its subsidiary to evade its responsibilities under the Act to honor its collective-bargaining agreement with the union); Eichleay Corp. v. International Association of Bridge, Structural and Ornamental Iron Workers, 944 F.2d 1047, 1059 (3d Cir. 1991)(alter ego presents existence of a disguised continuance or an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or a technical change in operations.) Karl Kellner's statements made prior to using the alter ego company Kellner Bros. is indicative of his motive to attempt to evade financial responsibility. Employee Eric Dobrick testified that in July 2002, Karl Kellner told him and other Union officials that he was switching assets from Deck Bros. to Kellner Bros., because a lawsuit was coming. The only lawsuit mentioned in this record is the one the Union has stated it will file to collect the arbitration award. Employee David Smith testified that in the same meeting, Karl Kellner said that the Deck Bros. employees were being leased to Kellner Bros, and that a lawsuit was pending against Deck Bros., causing Deck Bros. to move assets over to Kellner Bros. The arrangement was clearly a sham. At the time Deck Bros. leased employees to Kellner Bros., employees were receiving paychecks drawn on Deck Bros.' checks.

Smith also testified that on October 10, 2002, Karl Kellner told him and other Union officials that Deck Bros. still existed, but was having a hard time making it, that there were lawsuits pending against Deck Bros., and that the arbitration case was probably one of the factors for changing Deck Bros. operation to Kellner Bros. Kellner then stated he wanted a new collective-bargaining agreement and would not honor the old one. Kellner's statement to Smith violated Section 8(a)(1) of the Act. Custom Wood Specialties, 243 NLRB 920 (1979)(Section 8(a)(1) violation for employer to tell employees it would not sign contract it was obligated to sign); Pacific Industries of San Jose, 189 NLRB 933 (1971). The events of the October 10, 2002 meeting as related by Smith were not disputed by Karl Kellner. Smith's notes of the meeting

read in pertinent part: the company "will not honor old contract," "arbitration was one of the factors for dropping Deck Bros.," "wants to negotiate a new contract . . . won't take Union dues out until a new contract is negotiated."

At the November 5, 2002 meeting, summarized on Respondent's Ex. 2, Karl Kellner indicated he wanted a new contract with substantial concessions and that the old contract was not in effect. These statements, and the positions taken by Karl Kellner, establish an attempt to evade obligations under the existing collective-bargaining agreement. Karl Kellner did not rebut or explain the statements.

The record contains even more evidence that Kellner Bros. is a disguised continuation of Deck Bros. in the form of Hazel Weaver's statements to employees when she handed out forms to employees before the company changed from Deck Bros. to Kellner Bros. Weaver handed out the paperwork and said she needed the forms completed for the payroll service and that it was simply a name change. Weaver's statements are consistent with the classic alter ego arrangement by an employer to attempt to evade liability by closing its business and reopening under a new name. Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942).

Weaver is an agent of Respondents within the meaning of Section 2(13) of the Act. Weaver's statements are attributable to Respondents by virtue of her agency status under Section 2(13) of the Act. Mar-Jam Supply Co., 337 NLRB No. 46 (2001). The Board applies common law principles in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. Cooper Industries, 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Southern Bag Corp., 315 NLRB 725 (1994). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. Service Employees Local 87, 291 NLRB 82 (1988).

Employee David Smith testified that he has heard Weaver referred to as controller, accountant and office manager. According to Smith, Weaver handles the payroll, remedies payroll disputes, and handles medical records and unemployment records. When Smith learned that Kellner Bros. stopped deducting Union dues, he asked Ronald Kellner about the matter. Ronald Kellner referred him to Weaver to answer his questions. Employee Eric Dobrick considered Weaver to be the Company's office manager and controller. She passes out paychecks and other written information coming from management to employees. She had the apparent authority to adjust time cards.

The Board's test for determining whether an employee is an agent of the employer is whether under all the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. Waterbed World, 286 NLRB 425 (1987). Here, Weaver spoke for management when she relayed company policy about payroll, paychecks, overtime and unemployment. She acted as a conduit for management explaining and enforcing company policies and reviewing and adjusting paycheck problems. Finally, in considering agency, the Board will consider whether the statements or actions of an alleged agent were consistent with the statements or actions of the employer. Great American Products, 312 NLRB 962 (1993). The manifestation of apparent authority is strengthened here because Weaver's statements to employees were consistent with Ronald and Karl Kellner's statements that they would not comply with the contract. When an employee approached Weaver about signing paperwork for a voluntary layoff, she told the employee that "Kellner Bros. does not have a contract with Deck." Thus Weaver's statements

strengthen my finding that Deck Bros. switched its payroll to Kellner Bros. as a sham transaction to evade the collective bargaining agreement.

3. Respondents Raised No Valid Defenses

Respondent contends on brief that it should not be found to have tried to evade the collective bargaining agreement as the Union negotiated with it for a new agreement. This is not a valid position. The Union met with Respondent because of the wage reopener provisions of the collective-bargaining agreement. Additionally, there could be no lawful bargaining under the circumstances. Karl Kellner informed the Union that he would not honor the contract and would not deduct Union dues without a new contract with significant concessions. Even Karl Kellner admitted that the Union's consistent position was that the extant collective-bargaining agreement was in effect and it wanted the company to abide by it.

Finally, Respondent cannot defend by asserting there was no repudiation because it adhered to other portions of the collective-bargaining agreement. By announcing its repudiation of the agreement, its demand for a new contract with concessions and by its refusal to adhere to the dues deduction and holiday pay provisions of the agreement, Respondents violated Section 8(a)(1) and (5) of the Act. Cannon Boiler Works, Inc., 304 NLRB 457 (1991)(Section 8(a)(5) abrogation of the contract for respondent to attempt to renegotiate the union-security and termination of agreement provisions while not discarding the entire contract); Summerville Construction Co., 327 NLRB 514 (1999)(repudiation of contract for inter alia failing and refusing to make dues check-off payments on behalf of employees who have authorized them to deduct them from wages.

Conclusions of Law

1. Respondent's Deck Bros., Inc. or R&K Custom Machinery and Kellner Bros. Inc. are employers engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Kellner Bros., Inc. is the alter ego of Deck Bros., Inc. and/or R&K Custom Machinery and was formed to evade the collective bargaining agreement between Deck Bros., Inc. and its obligations arising thereunder, including an arbitration award to the Union.

4. At all material times, the Union has been the designated exclusive collective-bargaining representative of the employees of Kellner Bros., Inc. and its predecessor Deck Bros., Inc. and/or R&K Custom Machinery in the following appropriate bargaining unit within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, full and part-time, exclusive of executives, supervisors employees not paid by the hour and office employees.

5. By repudiating and failing to continue in effect all the terms and conditions, specifically the dues check-off and holiday pay provisions, of the collective-bargaining agreement between Deck Bros., Inc and the Union which expired on April 30, 2003, Respondents have violated Section 8(a)(1) and (5) of the Act.

6. By Karl Kellner informing employees that Respondents were unwilling to honor the collective-bargaining agreement referenced above, Respondents have violated Section 8(a)(1) of the Act.

7. The unfair labor practices committed by Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents unlawfully repudiated and failed to continue in effect all the terms and conditions of their collective-bargaining agreement with the Union, including the dues check-off and holiday pay provisions, I recommend that the Union be made whole by remitting to it all dues Respondents were required to deduct from its employees' pay and its employees be made whole by paying them for all monies they lost by Respondents refusal and failure to comply with the Holiday pay provisions of the collective bargaining agreement from the date of its unlawful actions, with interest to be computed in accordance with New Horizons for the Retarded, 283 NLRB 1173 (1987). The make whole recommendation for the failure to deduct Union dues is limited to those employees who had signed dues deduction authorizations and this obligation is not applicable to employees, if any, who voluntarily paid dues to the Union during any or all of the pertinent period. I also recommend that Respondents abide by the terms of the collective bargaining agreement which expired on April 30, 2003, and on request, recognize and bargain collectively with the Union in good faith as the exclusive representative of the employees in the appropriate bargaining unit concerning terms and conditions of employment, and if an understanding is reached, embody that understanding in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondents, Deck Bros., Inc. and/or R&K Custom Machinery and Kellner Bros., Inc., of Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   a. Failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of employees in the bargaining unit, by repudiating and failing to continue in effect all the terms and conditions, specifically the dues check-off and holiday pay provisions, of the collective-bargaining agreement between Deck Bros., Inc and the Union which expired on April 30,

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2003.

b. Informing employees that Respondents were unwilling to honor the collective-bargaining agreement referenced above.

c. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Recognize, and on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, full and part-time, exclusive of executives, supervisors employees not paid by the hour and office employees.

b. Reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement between Deck Bros., Inc. and/or R&K Custom Machinery, which expired April 30, 2003.

c. Make whole any unit employees for any losses they may have suffered by Respondents unlawful failure and refusal to honor the Holiday Pay provisions of the collective-bargaining agreement referenced above, in the manner set forth in the Remedy section of this decision.

d. Reimburse the Union for dues the Respondents failed and refused to deduct and remit to the Union, in the manner set forth in the Remedy section of this decision.

e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

f. Within 14 days after service by the Region, post at its facility in Buffalo, New York copies of the attached notice marked "Appendix."[6] Copies of the notice,

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2002.

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Wallace H. Nations
Administrative Law Judge